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No. 91-2016

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

KENNETH E. HADDOCK,
Petitioner

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court correctly held that intent to defraud or injure a bank within the meaning of 18 United States Code Section 656 may exist where defendant presented to bank a single check drawn on an account lacking sufficient funds, but was not shown to have used his position as an officer or director of that bank to have the check honored.

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Kenneth E. Haddock, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are found in Appendix A and C *infra*. The panel decision is reported at 956 F.2d 1299. The opinion on rehearing is not yet published. The district court decision is unreported and is in Appendix B, 37a.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1992. A petition for rehearing was granted in part and decided on May 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 United States Code, Section 656 provided in pertinent part in 1987:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . .

STATEMENT

1. The charges below essentially revolved around the Bank of Herington, in Herington, Kansas, and the Bank of White City, in White City, Kansas. Both banks were owned by Herington Bancshares. Haddock held 60% of the stock and was Chairman of the Board and Chief Executive Officer of both banks. Tr. 236 (C.A. App. 186).

2. Upon hearing at the end of March, 1987, that another bank, the National Bank of Herington was for sale through auction, Haddock approached the FDIC and inquired about the purchase by Herington Bancshares. Haddock advised the FDIC that other investors "would give him the necessary amounts of money to fund the capital injection. . . ." Tr. 177 (C.A. App. 180). See also *id.* at 178 (C.A. App. 182).

Two days after bids were received, both defendant and the Secretary of Herington Bancshares executed a check in the amount that had to be injected into that Bank for the auction. *Id.* at 160-61 (C.A. App. 175-76). The ac-

count on which the check was written lacked sufficient funds only if loan funds to be advanced were not considered. *Id.*

As a result of a bookkeeping error and the failure of that bookkeeper to reconcile the accounts on a daily basis, the check was never returned for insufficient funds. Tr. 362-63 (C.A. App. 205-06). This error was due largely to all of the confusion surrounding the acquisition. Tr. 363 (C.A. App. 206). Nevertheless, once the error was discovered and brought to Haddock's attention, he injected the needed funds into the account on the same day. *Id.* at 363-64.[1]

In 1986, Haddock had set up an entirely different entity, First Finance, Inc., for the purpose of acquiring loans from the FDIC and other lending institutions and then reselling bankable credits to the Bank of Herington and/or the Bank of White City.[2] First Finance would hold and service the lower quality loans. Haddock's dual role as owner and officer of the two banks and as owner of First Finance was discussed with, and known to the Board of Directors of each entity. *Id.* at 282-85, 302. (C.A. App. 192-96, 199).

Before defendant engaged in transactions involving First Finance, he specifically informed federal and state governmental authorities of the proposed plan. *Id.* at 283 (C.A. App. 193). Accordingly, Haddock wrote to, among others, the State Deputy Bank Commissioner and the Regional FDIC Director, requesting approval of the arrangement, and noting specifically that the Boards of the two banks would be apprised of the conflicts. Neither agency voiced any objection, and simply stated that Federal Reserve Sec. 23A should be reviewed for compliance.

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[1] These allegations were charged as a crime in Count One. The conviction on that count was reversed because the instructions were deficient in that the lower court failed to instruct on defendant's good faith. 19a *et seq.*

[2] Haddock was President and sole shareholder of First Finance. Tr., at 187.

See Def. Ex. 402 (C.A. App. 280). Significantly, defendant advised State and Federal authorities specifically of the need for outside financing for his company, and his plan to buy and then resell the portfolios to his own bank. Def. Ex. 400. Tr. 669 (C.A. App. 241). Similarly, Haddock discussed with the respective Boards of White City and Herington whether to proceed with First Finance. *Id.* at 283 (C.A. App. 193).

Subsequently, First Finance and White City entered into a series of transactions in which loans were purchased by First Finance from the FDIC and then resold to the Bank. One such transaction related to the failed Bank of Easton. In April, 1987, Bank of White City's Vice-President, Patty Fells, and Mike Beltz of First Finance executed an agreement providing that the Bank was to give First Finance a "down payment of 250,000 in First Finance . . . [for the] exclusive purchase rights" to the portfolio. *Id.* at 252-54 (C.A. App. 187-89). Gov. Ex. 25.[3]

Just as he had done on the previous transaction, and as he had explained in his letter to Federal and State authorities, defendant obtained financing in order to complete the deal. On April 1, 1987, defendant approached Kaw Valley State Bank about a loan specifically so that he could acquire the Easton portfolio and complete the transaction with the Bank of White City. *Id.* at 427-31 (C.A. App. 217). Kaw Valley loaned defendant $711,000 on April 6, 1987. *Id.* at 431 (C.A. App. 218) Although nothing in the Agreement between First Finance and White City required such action, defendant used a portion of the Kaw Valley loan to refund the $250,000 down-

[3] Defendant was nevertheless convicted for "misapplying" the $250,000 downpayment, as charged in Count 5, since he used a portion of it for purposes other than the acquisition of the Easton package, namely to purchase a house. However, defendant actually repaid the downpayment received from the Bank of White City within three weeks of having received it, on May 5, 1987. Tr. 619 (C.A. 235).

payment to the Bank of White City. *Id.* at 619 (C.A. App. 235).[4]

3. Defendant Haddock was indicted by a Federal Grand Jury for the District of Kansas. The check presented by him to the Bank of Herington was charged in Count I as a misapplication of bank funds, in violation of 18 U.S.C. § 656. He was convicted of that count, as well of engaging in bank fraud, making false statements and misapplying bank funds. Indict., App. 1.

4. A panel of the Court of Appeals for the Tenth Circuit consisting of the Honorable Circuit Judges Anderson and Tacha, and District Judge Christensen, sitting by designation, reversed the conviction on count one, as well as count eight, charging a wholly separate and distinct crime of misapplication of bank funds, holding that the lower court had erred in failing to provide a good faith instruction to the jury on both counts. 19a, *et seq.* The court further held that the sentence must be vacated because it was based upon an improper definition of "loss" under the Guidelines. 36a.

Nevertheless, the panel did not vacate the remaining eight counts, or reach defendant's arguments that the evidence on the two counts which it vacated had been insufficient to sustain the verdict. Rather, the panel held that because it remanded on count one for a "new trial, [it would not] consider whether evidence was sufficient to convict on that count." 24a. Nor did the panel reach appellant's argument that because there had been substantial spillover from Count One to the remaining counts, which it remanded only for sentencing purposes, the entire conviction had to be vacated.[5]

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[4] Defendant was also convicted for misapplying the loan proceeds received from Kaw Valley since he used a portion of it to refund White City's downpayment, rather than to purchase directly the loan portfolio. See Indict., Count 4.

[5] The government did not dispute in its briefs below that there was substantial spillover from Count One to the remaining counts,

5. Haddock filed a petition for rehearing with suggestion for rehearing en banc to determine whether the panel erred in ordering a retrial on Count One, without first considering whether there had been sufficient evidence to sustain the conviction on that Count. He further argued that it was error to reverse the conviction on only two counts without considering whether there was prejudicial spillover from these counts to the remaining counts. On May 15, 1992, the court of appeals granted rehearing to consider whether there was sufficient evidence on count one. The court acknowledged that under controlling law of that circuit it had erred in not doing so on appeal prior to ordering a new trial. 45a.

The court nevertheless found that the reasoning of *Williams v. United States*, 458 U.S. 279 (1982), was not applicable to a prosecution, as here, under 18 U.S.C. § 656, for misapplication of bank funds. The court rejected defendant's argument that cases construing *Williams* have held that a misapplication cannot be shown to exist where defendant did nothing more than overdraft a single check, *and* there was no showing that he had used his position to cause his own bank to honor the check. 46a-47a. It therefore held that defendant could be convicted of misapplying bank funds where he was an officer and director of a bank, and he had issued a check drawn on an account at another institution which had insufficient funds to cover the check. 46a-48a.

REASONS FOR GRANTING THE PETITION

Haddock argued on appeal, and on rehearing below, that the conviction on Count One had to be vacated because there was no evidence to sustain the jury's verdict that he was guilty of the charged offense. While the court agreed on rehearing that it could not reverse and order a new trial on that count, it then went on to find that

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and that if Count One was vacated, then the remaining counts had to be vacated as well.

the evidence at trial had been sufficient to convict, and that a retrial would therefore not offend the Double Jeopardy Clause of the Constitution.

The decision below allows a conviction for misapplying bank funds even though there is nothing more than a showing that the defendant generally exercised substantial control over the banking institution in which he deposits a check with insufficient funds. That decision conflicts with the decisions of this Court and several courts of appeals, holding that there must be some showing that defendant took some action, or actually used his position to avoid having his overdrawn check dishonored. Review by this Court is necessary to maintain uniformity of decisions of those courts of appeals and with this Court.

1. The decision below is inconsistent with this Court's decision in *Williams v. United States*, 458 U.S. 279 (1982). In that case, defendant was convicted for writing a single check drawn on an account with insufficient funds, as here. However, unlike here, that defendant had actually engaged in a "classic" "check kiting" scheme. 458 U.S. at 284, citing lower court opinion at 639 F.2d 1311, 1319 (5th Cir. 1981). The *Williams* Court nevertheless went on to specifically reject the government's theory that defendant could be convicted because he did not have funds on hand when the check was presented.

The lower court nevertheless held *Williams* to be inapplicable on the ground that *Williams* and other 'false statement' cases . . . are not relevant to a conviction under § 656." 47a. But any such construction of *Williams* is strained. First, *Williams* itself recognized that *none* of the then existing federal statutes, which included Section 656, allowed a prosecution for writing a check drawn on an account with insufficient funds. 458 U.S. 286-290.

Second, there is utterly no difference between the elements at issue in Section 656, involved here, and the statute involved in *Williams*. Both statutes punish only conduct intended to injure or defraud a bank or other

institution covered by the statute. Accordingly, this Court might as easily have been addressing Section 656, when it said:

> The United States suggests that one who deposits a check represents that he "currently has funds on deposit sufficient to cover the face value." Brief for United States 19. But it would be equally plausible to suggest that many people understand a check to represent that the drawer will have sufficient funds deposited in his account by the time the check clears, or that the drawer will make good the face value of the draft if it is dishonored by the bank. [458 U.S. 286 n.7].

The Court pointed out that the later practices were not only reasonable but found substantial support in the Uniform Commercial Code. 458 U.S. 285. There could hardly be any clearer statement by this Court that such conduct—without more—cannot give rise to a judgment that defendant acted with the intent to defraud the bank.

Further, the lower court's theoretical distinction between the false statement prosecution involved in *Williams* and a charge of misapplication under Section 656 withers once it is recognized that misapplication charges are usually based on nothing more than some false statement or other misrepresentation in which a bank officer is able to divert funds from a bank. See, e.g., *United States v. Unruh*, 855 F.2d 1363, 1371 (9th Cir. 1987) ("misapplication occurs when funds are distributed under a record which misrepresents the true state of the record with the intent that the bank officials, bank examiners, or the FDIC will be deceived"), quoting from *United States v. Kennedy*, 564 F.2d 1329, 1339 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978).

2. Review is also necessary to maintain uniformity of decisions among the courts of appeals. Until the decision below, it was agreed that "[t]he honoring of a check which creates an overdraft is not necessarily a violation of 18 U.S.C. § 656," and further that defendant must have been shown to have used his position as a director

or officer of the bank to have brought about the misapplication by taking action to have the overdrawn check honored by the bank. *Seals v. United States*, 221 F.2d 243 (8th Cir. 1955); *Dow v. United States*, 82 F. 904, 908 (8th Cir.) (holding that criminal intent "cannot be inferred, as a matter of law, from the mere fact that when the check was drawn there were not funds on deposit to meet the check . . . ."); *Logsdon v. United States*, 253 F.2d 12, 14 (6th Cir. 1958) ("Overdrafts alone are not sufficient to show, in and of themselves, a violation of the statute"); *United States v. Wiggerhorn*, 312 F.2d 289 (9th Cir. 1963) ("The mere drawing and cashing of an overdraft, without more, is not a criminal offense"); *United States v. Frazier*, 880 F.2d 878, 884 (6th Cir. 1989) (approving jury instruction that "mere payment of a check that created or increased an overdraft is not sufficient to show a violation if the officer causing the payment had no intent to defraud or injury the bank"); *United States v. Cawthon*, 125 F.Supp. 419 (D.C. Ga. 1954).[6]

United States v. Wiggerhorn, *supra*, is flatly inconsistent with the Tenth Circuit decision. In that case the Ninth Circuit held that "[t]he mere drawing and cashing of an overdraft, without more, is not a criminal offense," 312 F.2d 289. Even more important, the court made clear that there must be a causal connection between the defendant's official position as a bank officer and the decision by the bank to honor the check. 312 F.2d at 292. That court

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[6] The only decision from another circuit relied upon by the lower court does not resolve this conflict among the courts. For example, in *United States v. Hughes*, 891 F.2d 597, 600 (9th Cir. 1989), the court approvingly cited *Logsdon v. United States*, 253 F.2d 12, 15 (6th Cir. 1958), for the proposition that there had to be some "expected collaboration of the cashier to make [the scheme] successful. . . ." It found such facts in testimony that defendant had "admitted to an FBI agent that he had contacted [an insider at the bank] about holding his checks," and that defendant had not simply presented a single overdrawn check, as here, but had issued multiple bad checks.

boiled the test down by explaining that the error in that case was that the "indictment contain[ed] no allegation that the defendant as an officer of the bank caused the checks to be honored or that but for his position as such officer, the checks would have been dishonored." 312 F.2d at 292.

The Fifth Circuit has reached the same result in *United States v. McCright*, 821 F.2d 226 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988), and similarly insists upon some causal connection between the defendant's position with the bank—other than his general control as an officer or director, and the bank's decision to honor the checks. The court there held that Section 656 "does contemplate some causal connection between the defendant's actions as an officer or director of the bank and the making of the loan. . . ." 821 F.2d at 230. That circuit further explained that "[m]anifest in the use of the term 'misapply' is a requirement that the defendant made, or influenced in a significant way, as an officer of the bank, the decision to extend the loan." 821 F.2d at 230.

3. Below, the panel failed to insist upon such a causal connection between the defendant's conduct and the bank's decision to honor the check. In lieu of any such showing, the lower court was content to sustain the conviction based, first, on the most generalized showings that defendant knew the amount that had to be paid and which was reflected on the check. 48a. But that is presumably true every time a person writes a check and deposits it knowing that it will be presented for payment. Second, the lower court observed that defendant exercised substantial control generally over the bank. 47a-48a. But that was true in *Wiggerhorn* and *McCright* and is generally true in every case where the defendant is an officer or director of the bank.

In fact, on the central question of whether defendant engaged in any conduct that would satisfy the *McCright* or *Wiggerhorn* holdings, the lower court implicitly ad-

mitted being unable to find any connection between defendant and the decision not to dishonor the check. It meekly explained that the "check oddly was never returned." 48a.

While any such finding is insufficient on its face to sustain the connection, even that finding cannot stand. The record firmly explains the reason why the check was never returned. The uncontradicted testimony was that the failure to return the check resulted from a bookkeeping error—and was not caused by any action by defendant.[7]

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[7] The following testimony was uncontradicted:

Q. Thank you, ma'am. This reconciliation of April the 15th when you found out the problem. This other young lady brought it to your attention.

A. Yes.

Q. That would have been the first day that the problem was found out?

A. Yes.

Q. But you just told the Court and this jury that the bank's books are reconciled on a daily basis?

A. They are to be reconciled, and they have been since then on a daily basis. After we purchased the First National Bank, she just didn't have time and nobody realized she was not balancing those books.

Q. And this was a period of time when, I guess, Ken Haddock or you as President were not trooping the line to make sure.

A. I wasn't president at that time, but, no, we just didn't have time, either.

Q. It was just so busy, wasn't it?

A. That's correct.

Q. So actually the, I guess, on the 6th or 7th of April the books didn't reconcile.

A. That's right, they didn't.

[Continued]

4. There is no legitimate law enforcement interest warranting an extension of section 656 to cover what can, at most, be argued to be a single overdrawn check. Following the *Williams* decision, Congress passed 18 U.S.C. § 1344 to fill the gap, supposedly created by that decision. Congress recognized in passing Section 1344, as the Supreme Court had in deciding *Williams*, that all "existing statutes," including Section 656, simply did not reach the conduct at issue in this case, requiring passage of a new statute designed to address such conduct. See S.Rep. No. 98-225, 98th Cong., 2d Sess. 377 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3518-19. If Haddock's conduct was a crime at all, although it surely was not, it was only a crime which could have been charged under that section. See *United States v. Rafsky*, 803 F.2d 105, 107 n.1. (3d Cir. 1986).

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[7] [Continued]

Q. And if somebody would have had the time, they would have determined on the 5th or the 6th that the books didn't reconcile.

A. Yes.

Q. So then the Board of Directors would not have gotten this interest-free loan for maybe just one day.

A. That's right.

Q. But somebody would have been—

A. Would have balanced, yes.

Q. Now, just because we were so busy, that's why it took so long.

A. That is correct. [Tr. 362-63; C.A. App. 205-06; 50a]

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 91-3075

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

KENNETH EUGENE HADDOCK,
Defendant-Appellant.

Feb. 14, 1992

Samuel Rosenthal, of Curtis Mallet-Prevost, Colt & Mosle, Washington, D.C., for defendant-appellant.

Kurt J. Shernuk (Lee Thompson, U.S. Atty., was with him on the brief), Asst. U.S. Atty., for plaintiff-appellee.

Before ANDERSON and TACHA, Circuit Judges, and CHRISTENSEN, District Judge.*

TACHA, Circuit Judge.

Defendant-appellant Kenneth E. Haddock appeals a jury verdict convicting him on two counts of misapplication of bank funds in violation of 18 U.S.C. § 656, six counts of bank fraud in violation of 18 U.S.C. § 1344, one count of false statement to a federally insured bank under 18 U.S.C. § 1014, and one count of making false state-

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* The Honorable A. Sherman Christensen, Senior District Judge for the United States District Court for the District of Utah, sitting by designation.

ments to the Federal Deposit Insurance Corporation (FDIC) under 18 U.S.C. § 1007. Haddock raises the following issues on appeal: (1) whether the conviction on Count 10 of the indictment was insufficient to state an offense and consequently violated the Ex Post Facto Clause; (2) whether the district court erred in denying appellant's motion for new trial filed more than seven days after return of the verdict; (3) whether appellant was denied effective assistance of counsel in violation of the Sixth Amendment; (4) whether the district court abused its discretion in excluding certain documents from evidence; (5) whether evidence was sufficient to support the convictions on Counts 1, 2, 3, 5 and 9; (6) whether the district court erred in failing to give a good faith instruction on Counts 1, 2, 8, and 10; (7) whether there existed a fatal variance between allegations in the indictment and evidence presented at trial; and (8) whether the district court erred in computing the amount of "loss" caused by Haddock as defined by the Sentencing Guidelines. We exercise jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand for resentencing and for a new trial on two counts.

BACKGROUND

This case revolves around the defendant, Kenneth E. Haddock, and his involvement with two banks—the Bank of White City and the Bank of Herington—and with another entity, First Finance, Inc. Both banks were owned by Herington Bancshares, a bank holding company of which Haddock owned fifty-five percent of the stock. During the period at issue in this case, Haddock was chairman of the board and chief executive officer of both banks. He also served as president of both banks until July, 1987. Haddock established First Finance, Inc. in 1986 for the purpose of acquiring loans from the FDIC and other lending institutions. He was president and sole shareholder of First Finance. The charges in this case involve several separate transactions.

Acquisition of First National Bank of Herington

On April 1, 1987, Haddock arranged with the FDIC for the Bank of Herington to purchase the failed First National Bank of Herington. As part of the arrangement, Haddock agreed that on April 3 Herington Bancshares would "inject" $960,892 in the Bank of Herington so that the Bank of Herington would meet the FDIC's minimum capitalization requirements necessary to absorb a bank the size of the First National Bank of Herington. On April 3, Haddock and the secretary of Herington Bancshares jointly executed a Herington Bancshares check to the Bank of Herington in the amount of $960,892. However, the Herington Bancshares account on which the check was written was funded with only $611,000—almost $350,000 less than the amount of the check.[1] Not until April 15 did Haddock deposit enough additional funds in the Herington Bancshares account to cover the $960,892 check. Despite the lack of funds in the Herington Bancshares account, the check was never returned for insufficient funds. At trial, the government argued that Haddock's actions permitted Herington Bancshares to have interest-free use of approximately $350,000 for the period between April 3 and April 15. The jury returned a verdict of guilty (Count 1) for misapplication of the Bank of Herington's funds in violation of 18 U.S.C. § 656.

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[1] Trial evidence indicated that the $611,000 in the account was the net proceeds of a loan to Herington Bancshares from Merchant's National Bank of Topeka, Kansas. Haddock had negotiated this loan in order to fund part of the required capital injection into the Bank of Herington. The evidence at trial shows that Herington Bancshares shareholders were to fund the remainder of the required injection. Haddock's personal share of the injection amount was approximately $200,000. The evidence shows that, by April 15, Haddock had funded his portion of the injection from the $250,000 received from the Bank of White City as a downpayment for the purchase of the Easton loan package—which is the subject of Count 3.

Acquisition of the Easton Loan Package

During April of 1987, Haddock, on behalf of First Finance, arranged with the FDIC to purchase loans from the failed Easton State Bank. In conjunction with this purchase, he arranged for the Bank of White City to purchase the Easton loans from First Finance.[2] In turn, the Bank of White City gave Haddock a $250,000 cashier's check as a "downpayment on exclusive purchase rights" for the Easton loan package. Haddock did not apply the $250,000 check toward the purchase of the Easton loans. The government presented evidence that Haddock instead used approximately $20,000 to fund his personal portion of the capital injection into the Bank of Herington, related to the bank's purchase of the failed First National Bank of Herington. He used the remainder to fund the purchase of a personal residence. Haddock later repaid the $250,000 to the Bank of White City.[3] The jury returned a guilty verdict on Count 3, which charged Haddock with executing a scheme to defraud the bank in violation of 18 U.S.C. § 1344.

On May 4, 1987, Kaw Valley State Bank loaned First Finance $711,000. The government presented evidence that Haddock represented to the bank in a signed affidavit that the loan proceeds would be used to purchase the Easton loan package. The bank requested this affidavit because First Finance pledged the Easton loans as collateral against the $711,000 loan, and the bank de-

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[2] The evidence at trial indicated that First Finance and Bank of White City previously had worked together to purchase FDIC loans. Counsel for Haddock introduced evidence and argued that Haddock had disclosed to bank regulatory officials and to the boards of the Bank of Herington and the Bank of White City that he intended to form First Finance and to use it as a vehicle for purchasing loans from the FDIC.

[3] According to the testimony of FDIC examiner Byron Lange, Haddock repaid the $250,000 by using a portion of the proceeds of a $711,000 loan from Kaw Valley State Bank—which is the subject of Count 4.

sired to have a purchase money security interest in the loans. In addition, Haddock showed Kaw Valley representatives a copy of a $866,344.44 check that First Finance purportedly had tendered to the FDIC to purchase the Easton loans. Officers from Kaw Valley State Bank testified that they understood that First Finance would use the loan proceeds to partially fund payment of the $866,344.44 check. In fact, the evidence at trial indicated that the check was never presented to the FDIC. The check stub in First Finance's checkbook indicated that the check was void; the original was never located. Despite Haddock's representations to Kaw Valley State Bank, $250,000 of the loan proceeds were used to refund the Bank of White City's downpayment for rights to purchase the Easton loan package. First Finance advanced another $55,000 to Haddock. First Finance did use $403,408.66 of the loan proceeds to make the first of two payments for the Easton loans to the FDIC on May 1, 1987. First Finance issued a $473,068.88 check to the FDIC on June 19, 1987 to fund the remainder of the purchase.[4] The jury returned a guilty verdict on Count 4, which charged Haddock with executing a scheme to defraud Kaw Valley State Bank under 18 U.S.C. § 1344.

After refunding the Bank of White City's $250,000 downpayment, First Finance (represented by Haddock) entered into a new agreement with the Bank of White City on June 24, 1987, whereby the Bank of White City gave First Finance $350,000 as a "downpayment" for exclusive rights to purchase the Easton loans. However, trial evidence indicated that Haddock had already received these loans from the FDIC and had pledged them to Kaw Valley State Bank as collateral for the $711,000

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[4] The trial evidence, comprised primarily of exhibits prepared by and testimony given by FDIC examiner Byron Lange, showed that this $473,068.88 payment was funded partially by a $350,000 down payment check from the Bank of White City (Count 3) and partially by a $103,000 check that Haddock wrote on his personal account at the Bank of Herington.

loan that is the subject of Count 4. Haddock and First Finance then used this $350,000 to fund a portion of the second installment to the FDIC for purchase of the Easton loan package. Count 5 charged Haddock with executing a scheme to commit fraud on the Bank of White City in violation of 18 U.S.C. § 1344; the jury returned a guilty verdict on this count.

When Haddock, on behalf of First Finance, applied for the $711,000 loan from Kaw Valley State Bank, he gave the bank a copy of his personal financial statement. At trial, the government presented evidence that the financial statement did not list a $10,000 debt owed by Haddock to First Finance and did not disclose that First Finance had extended a $350,000 open line of credit to Haddock. When Haddock gave the financial statement to Kaw Valley's president, he had not yet drawn on the line of credit. However, he received $303,947.05 from First Finance on this line of credit two days after the date of the financial statement. Count 2 charged Haddock with making a false statement to Kaw Valley State Bank in violation of 18 U.S.C. § 1014. The jury returned a guilty verdict.

Acquisition of the Nortonville Loan Package

In October of 1987, First Finance entered an agreement to purchase the "Nortonville Loan Package," consisting of twenty-nine loans, from the FDIC. In conjunction with this purchase, the Bank of White City gave Haddock a $273,500 check—payable to the FDIC—to be used to purchase the Nortonville loan package. At trial, counsel for Haddock argued that the Bank of White City did not know how many of the loans it would receive and that Haddock and the bank's president were to decide later which loans the bank would purchase. To the contrary, the government presented evidence that the Bank of White City and Haddock understood that the bank was to receive all of the Nortonville loans. The Bank of White City received only twelve of the twenty-nine Nor-

tonville loans.[5] Haddock pledged the remaining loans as collateral for a $94,000 loan to First Finance from Kaw Valley State Bank. Count 6 charged Haddock with executing a scheme to defraud the Bank of White City in violation of 18 U.S.C. § 1344. The jury returned a guilty verdict on this count.

. The government also presented evidence that Kaw Valley State Bank made the $94,000 loan to First Finance on October 30, 1987 based on Haddock's representation that the bank would have a security interest in the entire Nortonville loan package. Haddock gave Kaw Valley State Bank a copy of a First Finance check for $200,000, which he represented was used to purchase the Nortonville loan package from the FDIC. Robert Maxwell, an officer at Kaw Valley State Bank, testified that, at the time of the loan, he understood that the Nortonville loans were purchased with the proceeds of the $94,000 loan and with First Finance funds.[6] He indicated that he was unaware that any other financial institution was involved. The check stub related to this check's number in First Finance's checkbook was marked "void." FDIC examiner Byron Lange testified that payment for the Nortonville loan package did not come from a First Finance check, but from a Bank of White City check in the amount of $273,500. The jury returned a guilty verdict on Count 7, which charged Haddock with executing a scheme to defraud Kaw Valley State Bank.

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[5] Haddock actually repurchased from the Bank of White City two of these twelve loans for $92,000 because the bank determined that the two loans were of a low quality and potentially could be classified by FDIC examiners.

[6] The evidence at trial indicated that Haddock did not apply the proceeds of the $94,000 loan toward the purchase of the Nortonville loans from the FDIC. Instead, he used most of the proceeds to fund a $92,000 check to the Bank of White City for repurchase of two of the twelve Nortonville loans that were forwarded to the Bank of White City.

Acquisition of the Galena Loan Package

Later in 1987, Haddock arranged to purchase the "Galena Loan Package" from the FDIC, which then was to be sold to the Bank of White City. On December 9, 1987, the Bank of White City issued a $50,000 check, payable to First Finance. Dave Farres, president of the Bank of White City, testified that he understood the $50,000 to be a downpayment for the purchase of the Galena loans. According to FDIC examiner Byron Lange, Haddock also told the FDIC that the $50,000 was used to purchase the Galena loans. However, First Finance used the $50,000 to fund part of a $150,000 loan payment to Kaw Valley State Bank. Count 8 charged Haddock with misapplication of this $50,000 in violation of 18 U.S.C. § 656; the jury returned a guilty verdict.

On December 11, 1987, the Bank of White City issued another check, in the amount of $7,766.45 and payable to the FDIC, to pay the balance of the purchase price for the Galena loan package. Fares testified that he understood that the total cost of the Galena loan package was $95,766.45; Haddock gave an asset sale agreement to Farres which reflected that figure. The total of the two checks issued by the Bank of White City was $120,766.45. Farres testified that he understood that the $25,000 difference between the amount paid to First Finance and the purported $95,766.45 cost of the Galena loan package was to be retained by First Finance as a "servicing fee." In fact, First Finance paid only $70,766.45 for the Galena loan package, not $95,766.45 as represented by Haddock to the Bank of White City. Count 9 alleged these facts and charged Haddock with executing a scheme to defraud the Bank of White City in violation of 18 U.S.C. § 1344. The jury returned a guilty verdict on Count 9.

FDIC Examination

During an FDIC investigation, FDIC examiner Byron Lange and his assistants reviewed First Finance's checkbook on May 26, 1987 and then returned it to Haddock.

The next day, Lange again reviewed the checkbook. At trial, he testified that some of the checkstubs had been altered since the time of his initial review. These changes included alterations to deposits made to the First Finance checking account and elimination of substantial overdrafts during April and May of 1987.[7] The jury returned a guilty verdict on Count 10, which charged Haddock with concealing relevant information from the FDIC in violation of 18 U.S.C. § 1007.

DISCUSSION

I. Indictment Defect and Ex Post Facto Clause Claim

Count 10 of the indictment charged the defendant with "knowingly and intentionally mak[ing] or invit[ing] reliance on a false, forged, or counterfeit statement, document or thing," namely the "altered checkbook of First Finance, Inc." This count tracks the language of 18 U.S.C. § 1007 as amended in 1989. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub.L. No. 101-73, § 961(f), 103 Stat. 500.[8] However, the conduct alleged in Count 10 occurred during 1988, before Congress amended the statute.

Haddock argues that the conduct alleged in Count 10 was not within the scope of the prohibitions of § 1007 until after the 1989 amendment. He further asserts that

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[7] In particular, Lange testified that several of the alterations were related to the deposit of loan proceeds of the $711,000 loan from Kaw Valley State Bank (Count 4) and to the deposit of the $250,000 received from the Bank of White City (Count 3).

[8] As amended on August 9, 1989, 18 U.S.C. § 1007 provides, in relevant part, the following:

> Whoever, for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation, knowingly makes or invites reliance on a false, forged, or counterfeit statement, document or thing shall be fined. . . .

because the indictment tracks the language of the 1989 amended version of the statute, the indictment fails to charge an offense that existed when the alleged conduct occurred and, therefore, the conviction violated the Ex Post Facto Clause of the Constitution.

Haddock did not object to the language of the indictment prior to trial. Instead, he raised the ex post facto claim both in his post-trial motion of February 19, 1991 and again on this appeal. Although most objections to an indictment are waived if not raised before trial, an indictment's failure to state an offense is a defect that may be raised at anytime, including on appeal. *United States v. Freeman*, 813 F.2d 303, 304 (10th Cir.1987). However, "the countervailing interest in judicial efficiency requires that tardily-challenged indictments be construed liberally in favor of validity." *Id.*

We have stated that "[a]n indictment is not insufficient merely because it fails to recite the precise language of the statute." *United States v. Poole*, 929 F.2d 1476, 1479 (10 Cir.1991). An indictment is generally sufficient "if it contains the elements of the offense charged, putting the defendant on fair notice of the charge against which he must defend, and if it enables a defendant to assert an acquittal or conviction in order to prevent being placed in jeopardy twice for the same offense." *United States v. Staggs*, 881 F.2d 1527, 1530 (10th Cir.1989) (citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974)). We must look to the allegations in the indictment to determine whether it adequately states the elements of an offense. *Id.*

A violation of the 1988 version of § 1007 required that a defendant 1) make any statement, 2) knowing it to be false, 3) for the purpose of obtaining a loan from the FDIC or otherwise influencing actions of the FDIC.[9] Count 10 of the indictment reads in part as follows:

> On or about May 26, 1988, . . . KENNETH E. HADDOCK for the purpose of influencing the actions of the Federal Deposit Insurance corporation, did knowingly and intentionally make or invite reliance on a false, forged, or counterfeit statement, document or thing; that is, during an audit by Federal Deposit Insurance Corporation of the books and accounts of First Finance, Inc., an affiliate of the Bank of White City and the Bank of Herington, the defendant did alter or caused to be altered the checkbook of First Finance, Inc., to conceal from Federal Deposit Insurance Corporation examiners payees of checks, dates of deposits, and balances of the First Finance Inc. checking account, and to conceal other facts relevant to the audit, all in violation of Title 18, United States Code, Section 1007.

The indictment clearly states that Haddock acted knowingly and with the purpose of influencing actions of the FDIC during the FDIC's investigation of charges related to this case. The only remaining question is whether Haddock's alleged conduct constitutes a "statement."

The indictment charges Haddock with "alter[ing] or caus[ing] to be altered" First Finance's checkbook to conceal payees, deposit dates, balances, and other facts relevant to the FDIC's audit. Citing *Williams v. United States*, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982), Haddock argues that the alleged alterations do not constitute a "statement." In *Williams*, the Supreme Court—reviewing the applicability of 18 U.S.C. § 1014

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[9] The 1988 version of section 1007, in force prior to the 1989 amendment, provided in pertinent part that "[w]hoever, for the purpose of obtaining any loan from the Federal Deposit Insurance Corporation . . . or for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation, makes any statement, knowing it to be false, . . . shall be fined . . . ." 18 U.S.C. § 1007 (1988).

to a check kiting scheme—held that the writing of a check does "not involve the making of a 'false statement' " because a check does not "make any representation as to the state of [the customer's] bank balance." *Id.* at 284-85, 102 S.Ct. at 3091. We cannot extend the reasoning of *Williams* to support Haddock's assertion that alterations made to selected check stubs in First Finance's check stubs in First Finance's checkbook do not constitute "statements." These alterations were made during an FDIC investigation of which appellant was fully aware. The indictment alleges that they were made in order to hide the truth about payees, account balances, and deposit dates. The alterations—as alleged—clearly represent an attempt to communicate something different to the FDIC than what the FDIC might have found had it reviewed the checkbook without the alterations. Therefore, we conclude that the conduct alleged in the indictment does include a "statement" as contemplated by the language of the pre-amendment version of § 1007.

Because the indictment alleges each of the elements required for a violation under the 1988 version of § 1007, we conclude that the indictment adequately apprised Haddock of the charges against which he needed to defend. *See United States v. Chestnut*, 533 F.2d 40, 44-45 (2d Cir.) (indictment sufficiently charged an offense even though it used language from the wrong version of the statute), *cert. denied*, 429 U.S. 829, 97 S.Ct. 88, 50 L.Ed.2d 93 (1976); *United States v. Cohen*, 450 F.2d 1019, 1020-21 (5th Cir.1971) (same).[10] We also conclude

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[10] The legislative history of the 1989 amendment to § 1007 demonstrates that Congress intended that acts that were criminal under pre-amendment § 1007 would continue to be criminal after enactment of the amendment:

> Section 961(f) condenses the language of 18 U.S.C. 1007 without altering the content. Section 961(f) also expands 1007 to

that the indictment's charging language, viewed in tandem with the record, is sufficiently specific and descriptive that Haddock may "subsequently avail himself of the form of jeopardy for future prosecution of the same offense." *United States v. Bulock*, 914 F.2d 1413, 1414 (10th Cir.1990). Furthermore, because the conduct alleged in the indictment constitutes an offense under the pre-amendment version of § 1007, we reject Haddock's ex post facto argument that the indictment failed to charge an offense that existed when the alleged conduct occurred.

Haddock argues that the district court erred by refusing to address the alleged indictment defect (including the Ex Post Facto Clause claim) when it was raised in Haddock's post-trial motion of February 19, 1991. Because an indictment's failure to state an offense is a defect that may be raised at any time, *Freeman*, 813 F.2d at 304, and Haddock's ex post facto argument implicates this very defect, the district court had jurisdiction to address the claim because it was raised before defendant filed a notice of appeal to this court. However, because w hold that the language of the indictment is not violative of ex post facto principles, we conclude that the district court's error in failing to address the claim was harmless.

II. Defendant's Second Motion for New Trial

The jury returned the verdict in this case on December 10, 1990. On December 13, Haddock filed a timely motion for new trial under Federal Rule of Criminal Procedure 33. That motion did not raise the Ex Post Facto Clause and ineffective assistance claims that Haddock argues on appeal. On February 7, 1991, the court entered an order denying Haddock's motion for new trial. On

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cover all fraudulent conduct regarding Federal Deposit Corporation transactions (presently dealt with in 18 U.S.C. 1008).

H.R.Rep. No. 54(I), 101st Cong., 1st Sess. 399 (1989), *reprinted in* 1989 U.S.Code Cong. & Admin.News 86, 196.

February 11, Haddock—represented by new counsel—filed a motion for leave to supplement his motion for new trial and to extend the time for filing his motion for new trial. On February 19, Haddock filed a motion for a judgment of acquittal, or, in the alternative, to arrest judgment and for a new trial. In this motion, Haddock asserted additional grounds to justify a new trial, including that his conviction under Count 10 violated the Ex Post Facto Clause and that he was denied his Sixth Amendment right to effective assistance of counsel. Based on the rationale that it lacked jurisdiction to grant either motion, the district court denied both of these motions.

On appeal, defendant argues that the district court erred in holding that it lacked jurisdiction to consider and grant these two motions. We review de novo a district court's determination that it had no jurisdiction to address a party's motion or claim. *See Walden v. Bartlett*, 840 F.2d 771, 772-73 (10th Cir.1988).

Haddock contends that, under *United States v. Miller*, 869 F.2d 1418 (10th Cir.1989), the district court had jurisdiction to consider the two motions. In *Miller*, we held that "a *motion to reconsider the denial of a new trial* under Fed.R.Crim.P. 33 is timely if filed within ten days of the entry of judgment or order." *Id.* at 1421 (emphasis added). In this case, however, neither of defendant's motions—dated February 11 and February 19—was tantamount to a *motion to reconsider* the court's denial of the initial motion for new trial. Instead, the two motions were an attempt to have the court consider a new motion for new trial that asserted numerous grounds not asserted in the original new trial motion. Rule 33 clearly states that a motion for new trial not based on newly discovered evidence must be filed within seven days after a jury's verdict. Fed.R.Crim.P. 33. Because these two motions were filed some two months after the jury's verdict, we agree with the district court that they were not timely under Rule 33.

Haddock also argues that the district court had jurisdiction to hear his ineffective assistance of counsel claim even though the claim was not raised in a motion for new trial within seven days after the verdict. He asserts that evidence of the ineffectiveness of trial counsel should be considered "newly discovered evidence" under Rule 33, thereby allowing a defendant to raise the claim in a new trial motion any time within two years after the verdict. Although Haddock correctly points out that the circuits are split over the issue, he fails to note that in *United States v. Miller*—a case that he cites elsewhere in his brief—we held that "[i]neffective assistance of counsel may not serve as the basis for a motion for a new trial on the ground of newly discovered evidence under Rule 33 where the facts alleged in support of the motion were within the defendant's knowledge at the time of trial." 869 F.2d at 1421. All other circuits except one that have addressed the issue have arrived at the same conclusion. *See United States v. Seago*, 930 F.2d 482, 488-89 (6th Cir.1991); *United States v. Lema*, 909 F.2d 561, 565 (1st Cir.1990); *United States v. Ugalde*, 861 F.2d 802, 806 (5th Cir.1988), *cert. denied*, 490 U.S. 1097, 109 S.Ct. 2447, 104 L.Ed.2d 1002 (1989); *United States v. Brown*, 742 F.2d 363, 368 (7th Cir.1984); *United States v. Dukes*, 727 F.2d 34, 39 (2d Cir.1984); *United States v. Lara-Hernandez*, 588 F.2d 272, 275 (9th Cir.1978). *But see United States v. Brown*, 476 F.2d 933, 935 n. 11 (D.C.Cir.1973). Based on *Miller*, we hold that Haddock's ineffective assistance claim was not raised in a timely motion for new trial.

Haddock further argues that the jurisdictional bar imposed by Rule 33 should not apply to his second motion for new trial because the motion refers to facts not known to him at the time of trial. We disagree. The claim of ineffective assistance of counsel in this case was that counsel failed to raise several legal defenses, failed to effectively cross-examine witnesses, and generally failed to perform effectively at trial. These facts, related to the

adequacy of counsel's trial performance, were available to defendant at the time of trial. *See Miller*, 869 F.2d at 1422.

Haddock contends that even if the ineffective assistance of counsel claim does not survive the jurisdictional bar of Rule 33, we should not dismiss this action but instead remand the case to allow him to collaterally attack the conviction pursuant to 28 U.S.C. § 2255. We find no basis—and defendant provides us with none—for his request that we remand the case for collateral attack on these grounds. Haddock must seek collateral review of the conviction in a separate action.

The district court's failure to address defendant's Ex Post Facto Clause claim was harmless error. With respect to the remainder of the arguments raised in defendant's post-trial motions of February 11 and February 19, we affirm the district court's dismissal of the motions as untimely under Rule 33.

III. Exclusion of Documents from Evidence

At trial and outside the jury's presence, counsel for Haddock proffered photocopies of six documents as evidence supporting Haddock's defense. The district court denied admission of these photocopies into evidence on the basis that "they did not have enough indication of reliability at this time that the court felt that [it] could allow them under the Rules of Evidence." In a memorandum reexamining that order, the court concluded that "the government had raised a genuine issue as to the authenticity of the originals." Defendant contends that these documents were admissible under the Federal Rules of Evidence and that the exclusion of these documents violated his Fifth Amendment and Sixth Amendment right to present evidence in his defense. The trial court is afforded broad discretion in making evidentiary rulings, and we reverse only upon a showing of abuse of that discretion. *United States v. Alexander*, 849 F.2d 1293, 1301 (10th Cir.1988).

Under Rule 1001(4) of the Federal Rules of Evidence, photocopies are considered duplicates. Rule 1003 provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Fed.R.Evid. 1003. Rule 1003 is part of a broadened set of evidentiary rules that reflect the fact that, due to modern and accurate reproduction techniques, duplicates and originals should normally be treated interchangeably. However, despite our age of technology, a trial court must still be wary of admitting duplicates "where the circumstances surrounding the execution of the writing present a substantial possibility of fraud." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 1003[02], at 1003-9 (1991).

With regard to each of these photocopies, evidence presented at trial indicates that only Haddock could recall ever seeing either the original or a copy of these documents. Except for Haddock, no one—including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent—was familiar with the contents of the photocopies. In addition, witnesses testified that several of the documents bore markings and included statements that did not comport with similar documents prepared in the ordinary course of business at the Bank of White City and at the Bank of Herington. Under these circumstances, we hold that the district court did not abuse its discretion by excluding these photocopied documents from evidence.

IV. Jury Instructions

A. Multiplicity and Duplicity

Haddock contends that the indictment—which was read to the jury as part of the court's instructions—was both multiplicitous and duplicitous. From the record, it appears that Haddock may have waived these objections to

the indictment's language. However, even if he did not waive them, we hold that the indictment was neither multiplicitous nor duplicitous.

An indictment is multiplicitous if it charges a single offense in more than one count. If multiplicitous, an indictment may lead to multiple sentences for the same conduct and may suggest to the jury that the defendant committed more than one crime. *See United States v. Dixon*, 921 F.2d 194, 196 (8th Cir. 1990). Duplicity, on the other hand, is joining two or more separate offenses in the same count. The vice of duplicity is that a jury may convict a defendant without unanimously agreeing on the defendant's guilt of the same offense. *See United States v. Saleh*, 875 F.2d 535, 537 (6th Cir.1989).

In the instant case, Haddock's sole ground for claiming that the indictment was multiplicitous and duplicitous is that each count in the indictment states that "[t]he grand jury realleges the foregoing paragraphs." Haddock argues that such an incorporation by reference causes each offense to be charged in more than one count and causes each count to charge more than one offense. We disagree. Each count of the indictment clearly describes separate conduct and charges a separate offense. In Instruction No. 7, the court specifically instructed the jury as follows:

> As you have noted, a separate crime or offense is charged in each of the counts of the Indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty on one of the offenses charged should not control your verdict as to any other offense charged.

Given the specificity of this instruction and the adequacy of the charging language in each count, we hold that each count's general incorporation language did not create the dangers associated with multiplicitous and duplicitous indictments.

B. Failure to Instruct Jury on Defendant's Good Faith

Haddock further contends that the district court erred by failing to instruct the jury on Haddock's good faith with regard to Counts 1, 2, 8 and 10. The government argues that Haddock has waived this objection as it relates to Counts 2 and 10 by not raising it prior to this appeal. The record reveals that Haddock's counsel tendered good faith instructions and objected to the court's failure to give good faith instructions only with regard to Counts 1 and 8. Because no objection was made to the lack of a good faith instruction with regard to Counts 2 and 10 prior to the jury's retirement, defendant has waived his right to so object. *United States v. Sanders*, 928 F.2d 940, 943 n. 2 (10th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 142, 116 L.Ed.2d 109 (1991); *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1311 (10th Cir.), *cert. denied*, 479 U.S. 884, 107 S.Ct. 275, 93 L.Ed.2d 251 (1986). Therefore, the only remaining question is whether the district court should have given a good faith instruction in connection with Counts 1 and 8, which involve violations of 18 U.S.C. § 656. When reviewing a challenge to jury instructions, "we review the record as a whole to determine whether the instructions state the law which governs and provided the jury with an ample understanding of the issues and the standards applicable." *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir.1988) (quoting *Ramsey v. Culpepper*, 738 F.2d 1092, 1098 (10th Cir.1984)).

It is well-established that good faith is a legitimate theory of defense to violations of § 656. *See, e.g., United States v. Unruh*, 855 F.2d 1363, 1369-70 (9th Cir.1987), *cert. denied*, 488 U.S. 974, 109 S.Ct. 513, 102 L.Ed.2d 548 (1988); *United States v. Steffen*, 641 F.2d 591, 596 (8th Cir.), *cert. denied*, 452 U.S. 943, 101 S.Ct. 3091, 69 L.Ed.2d 959 (1981). "As a general proposition a defendant is entitled to an instruction as to any recognized de-

fense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Matthews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988); *United States v. Harting*, 879 F.2d 765, 767 (10th Cir.1989).

The district court held that Haddock was not entitled to a separate good faith instruction because the specific instructions given on the meaning of the phrases "willfully misapplies" and "intent to injure or defraud" from § 656 sufficiently conveyed the essence of a good faith defense that "[t]he phrase 'willfully misapplies' means the unjustifiable or wrongful use of the monies, funds or credits of the bank. Willful misapplication means more than bad administration." The instruction further stated that "[t]he phrase 'with intent to injure or defraud the bank' means to act knowingly and with the intent to deceive or to cheat the bank—ordinarily for the purpose of either causing a financial gain or a financial loss to someone or something." In addition, we note that the court gave a separate good faith instruction on six other counts, but conspicuously did not include Counts 1 and 8—which charged violations of § 656—within the scope of that instruction.

In this circuit, we have held that general instructions on willfulness and intent are insufficient to fully and clearly convey a defendant's good faith defense to the jury. *United States v. Mann*, 884 F.2d 532, 536-37 (10th Cir. 1989) (good faith instruction under 26 U.S.C. § 7203, willful failure to file income tax returns); *United States v. Harting*, 879 F.2d at 767 (same); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir.1984) (en banc) (good faith instruction under 18 U.S.C. § 1341, mail fraud); *accord United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir.1985); *see also United States v. Ratchford*, 942 F.2d 702, 706-07 (10th Cir.1991) (under 18 U.S.C. § 657 [fraud on lending, credit and insurance institutions], there was no error in good faith instruction

that defendant acting upon "honest opinion or belief is not chargeable with fraudulent intent even if his opinion is erroneous or his belief is mistaken or wrong"). We also have held that failure to give an adequate good faith instruction is reversible error provided "the evidence is sufficient such that a reasonable jury could believe" the defendant's good faith defense. *Harting*, 879 F.2d at 768. Based on clear precedent in this circuit, we hold that because the instructions in this case did no more than define "willfulness" and "intent to injure or defraud" under § 656, they did not adequately convey Haddock's good faith defense to the jury.[11] Therefore, we turn to the question of whether the evidence is such that a reasonable jury could believe Haddock's good faith defense.[12]

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[11] In holding that Instruction 11 adequately submitted Haddock's good faith theory of defense to the jury, the district court relied on authority from several other circuits that have found that complete instructions on willfulness and intent to defraud state the "essence of a good faith instruction." *See United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir.1990); *United States v. Nivica*, 887 F.2d 1110, 1124-25 (1st Cir.1989) (citing *New England Enterprises, Inc. v. United States*, 400 F.2d 58, 71 (1st Cir. 1968)), *cert. denied*, 393 U.S. 1036, 89 S.Ct. 654, 21 L.Ed.2d 581 (1990); *United States v. Gunter*, 876 F.2d 1113, 1118-20 (5th Cir.), *cert, denied*, 492 U.S. 871, 110 S.Ct. 198, 107 L.Ed.2d 152 (1989); *United States v. Alcantar*, 932 F.2d 1175, 1179 (9th Cir.1987); *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir.1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985); *United States v. Gambler*, 662 F.2d 834, 837 (D.C.Cir.1981). Despite the contrary position taken by most other circuits that have addressed the issue, we are constrained by the precedent in this circuit to hold that the instructions in this case were inadequate to state Haddock's good faith theory of defense to the jury.

[12] At trial and on appeal, Haddock has argued and presented evidence that he made proper disclosures to regulatory officials and to the Boards of Directors of the Bank of Herington and the Bank of White City before he formed First Finance and used it as the vehicle for purchasing loan packages from the FDIC. He asserts that the evidence of these disclosures was sufficient to support a good faith instruction to the jury. Although these disclosures might be evidence of Haddock's good faith in establishing First Finance

Count 1 charges Haddock with presenting a check written on a First Finance account that he knew was short of funds by approximately $350,000. The account remained without sufficient funds between April 3, 1987 and April 15, 1987. At trial, Haddock testified that he relied on a representation by Patricia Fells—then an officer at the Bank of Herington—that the account contained sufficient funds to cover the check. He stated that he was not aware of a shortage of funds until long after April, 1987. In addition, Fells testified that the books at the Bank of Herington were not regularly balanced between April 3 and April 15 and that business at the bank was a "nightmare" due to the bank's acquisition of the failed First National Bank of Herington. She also suggested that Haddock would have put money into the account before April 15 had the lack of funds been brought to his attention.

Count 8 charges Hadock with misapplying $50,000 of funds forwarded by the Bank of White City to First Finance so that First Finance could make a down payment toward the purchase of the Galena loan package. At trial, evidence was introduced that Haddock instead used the money to make a loan payment on an unrelated loan at Kaw Valley State Bank. However, Haddock testified at trial that the $50,000 check given by the Bank of White City to First Finance had nothing to do with the purchase of the Galena loans. He testified that $25,000 of the money was to be placed into an escrow acount and to be forwarded to First Finance as the Bank of White City received additional loans. He further testified that both entities agreed that First Finance could use the remaining $25,000 however it wished.

Based on this evidence related to Counts 1 and 8, we hold that Haddock was entitled to a good faith instruction

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and in making appropriate arrangements for First Finance to be an intermediary in the purchase of loans from the FDIC, they are not evidence relevant to Haddock's good faith related to the alleged violations of § 656.

in relation to those counts. Therefore, we reverse the convictions on Counts 1 and 8 and remand for new trial on those counts.

V. Variance Between Indictment and Evidence at Trial

A variance between an indictment and proof at trial occurs "when 'the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment.' " *Hunter v. New Mexico*, 916 F.2d 595, 598 (10th Cir.1990) (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir.1986)), *cert. denied*, —— U.S. ——, 111 S.Ct. 1693, 114 L.Ed.2d 87 (1991). When such a variance occurs, " 'convictions generally have been sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment.' " *Id.* at 599 (quoting *United States v. Miller*, 471 U.S. 130, 136, 105 S.Ct. 1811, 1815, 85 L.Ed.2d 99 (1985)). A variance "is fatal only when the defendant is prejudiced in his defense because he cannot anticipate from the indictment what evidence will be presented against him or is exposed to the risk of double jeopardy." *Id.*

On appeal, Haddock seems to argue two different "variances." He first contends that although the indictment charged Hadock "with violating policies and laws prohibiting conflicts of interest," evidence at trial showed that he made proper disclosures and abstained from voting so that he did not commit such violations. We note that this alleged error is not in the nature of a "variance" as described in our cases because—as Haddock's argument concedes—the indictment warned Haddock of the need to defend against conflict-of-interest accusations. Furthermore, after reviewing the indictment's language, we conclude that the few references to Haddock's conflict-of-interest responsibilities did not substantially prejudice his rights.[13]

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[13] Introductory paragraph 10 of the indictment states that "defendant KENNETH E. HADDOCK, as a Director, Officer and per-

Haddock also contends that the government argued at trial that Haddock violated conflict-of-interest rules. This argument is more in the nature of a "variance" argument because the indictment's charging language does not refer to such violations. However, after reviewing the record, we conclude that the few innocuous references related to conflict-of-interest rules were closely related to the charges in Counts 3 and 5 that Haddock engaged in a scheme to defraud the Bank of White City. Therefore, we conclude that the evidence at trial did not prove facts materially different from those alleged in the indictment.

VI. Sufficiency of the Evidence

Haddock challenges the sufficiency of the evidence to sustain his conviction on Counts 1, 2, 3, 5, and 9. Because we reverse Haddock's conviction on Count 1 and remand for new trial on that count, we do not consider whether evidence was sufficient to convict on that count. " 'Evidence is considered sufficient to support a criminal conviction if, when viewed in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt.' " *United States v. Ratchford*, 942 F.2d 702, 703 (10th Cir.1991) (quoting *United States v. Culpepper*, 834 F.2d 879, 881 (10th Cir. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979))).

Count 2

Count 2 charged Haddock with making a false statement in violation of 18 U.S.C. § 1014 to Kaw Valley State Bank when Haddock negotiated with the bank to obtain a

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son affiliated with federally insured institutions, had an obligation to operate the institutions safely, prudently and free of any fraud, conflict of interest, or self-dealing." Paragraph 6 also explains in some detail Haddock's relationship to the Bank of Herington, the Bank of White City, and Herington Bancshares, as well as the fact that he was incorporator, sole shareholder, president and secretary of First Finance, Inc.

$711,000 loan. In particular, the count alleges that Haddock failed to list two items on Haddock's personal financial statement requested by the bank. The financial statement did not list a $10,000 debt from First Finance to Haddock and did not list a $350,000 open line of credit from First Finance to Haddock, both of which allegedly were outstanding on April 1, 1987—the date Haddock filled out the form financial statement at Kaw Valley State Bank.

The essential elements of a § 1014 violation are 1) that defendant made a false statement to a bank; 2) that he or she did so for the purpose of influencing the bank's action; 3) that the statement was false as to a material fact; and 4) that the defendant made the false statements knowingly. *United States v. Smith*, 838 F.2d 436, 439 (10th Cir.1988), *cert. denied*, 490 U.S. 1036, 109 S.Ct. 1935, 104 L.Ed.2d 407 (1989).

A. Failure to List the Line of Credit

At trial, the government presented evidence—a resolution of First Finance dated February 13, 1987 (Government's Exhibit 3)—indicating that First Finance already had extended Haddock the $350,000 line of credit at the time he completed his financial statement on April 1, 1987. Haddock testified at trial that the line of credit did not exist on April 1, but that he had created Exhibit 3 after April 1 and had backdated the resolution. On appeal, Haddock no longer contends that the line of credit did not exist on April 1; instead, he now contends that failure to list a line of credit that had not yet been drawn upon is not a material, false statement as required by § 1014.

By returning a verdict of guilty on Count 2, the jury could have discredited Haddock's testimony that the line of credit was created after April 1, 1987 and was then backdated to February 13, 1987. The jury's perception of

Haddock's testimony regarding the existenc of the line of credit also could have influenced its determination of whether Haddock knowingly concealed the line of credit in order to obtain the $711,000 loan from Kaw Valley State Bank. In addition, based on evidence presented at trial regarding Haddock's position as president and chairman of the board of two different banks, the jury could have concluded that Haddock was aware that the existence of a $350,000 line of credit was germane to his creditworthiness. The form financial statement Haddock filled out clearly requested a complete disclosure of Haddock's financial position. We have reviewed the statement and conclude that the category entitled "Contingent Liabilities—Other special debt" is a point at which a reasonable jury could have concluded that Haddock should have listed an open line of credit that was material to his financial position. Under these circumstances, viewing the evidence in the light most favorable to the government, we conclude that a reasonable jury could have found beyond a reasonable doubt that Haddock knew that the line of credit was relevant to his financial position and, therefore, that failure to disclose the line of credit was equivalent to a knowingly false statement.

B. Failure to List the $10,000 Loan

Count 2 also alleges that Haddock failed to list on his personal financial statement a $10,000 loan that he had received from First Finance. At trial, Haddock testified that he had simply forgotten to list the outstanding loan. On appeal, Haddock contends that his failure to list the $10,000 loan was not material. To support this contention, Haddock points to the trial testimony of Gerald Lauber, President of Kaw Valley State Bank. Lauber testified that he "might view" the $10,000 loan to be "a wash" because the $10,000 loan to Haddock was from First Finance, a corporation of which Haddock owned 100% of the stock. Lauber also testified that inclusion of the $10,000 loan in the financial statement "would not have

had a significant bearing" on the decision to make the loan. We also note that, at another point in the cross-examination by defendant's counsel, Lauber testified that "if Mr. Haddock had an obligation to another entity, it should have been on the financial statement."

In the context of other false statements statutes, we have held that materiality is a question of law to be determined by the court. *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir.1990) (18 U.S.C. § 1001, false statements as to matters within jurisdiction of a federal agency), *cert. denied*, —— U.S. ——, 112 S.Ct. 405, 116 L.Ed.2d 354 (1991); *United States v. Vap*, 852 F.2d 1249, 1253-54 (10th Cir.1988) (18 U.S.C. § 1623, perjury before a grand jury); *United States v. Masters*, 484 F.2d 1251, 1254 (10th Cir.1973) (18 U.S.C. § 1621, general perjury statute). Likewise, we hold that materiality under 18 U.S.C. § 1014 is a question of law. *See United States v. Shriver*, 842 F.2d 968, 976-77 (7th Cir.1988); *United States v. Ryan*, 828 F.2d 1010, 1018 (3d Cir. 1987).

Also in the context of another false statements statute, "we have defined materiality as a natural tendency to influence, or the capability of influencing" a decision maker. *Daily*, 921 F.2d at 1003 n. 9. Actual reliance by Kaw Valley State Bank on defendant's omission of the $10,000 loan need not be shown to meet the materiality requirement under § 1014; instead, we must only determine whether omission of the loan had the capacity to influence the bank's decision. *See Shriver*, 842 F.2d at 976 n. 11 ("reliance and materiality are not the same thing § 1014"; capacity to influence is the correct test); *Theron v. United States Marshal*, 832 F.2d 492, 497 (9th Cir.1987) "A statement concerns a material fact when the statement has the capacity to influence the lending decision."), *cert. denied*, 486 U.S. 1059, 108 S.Ct. 2830, 100 L.Ed.2d 930 (1988); *United States v. McGee*, 831 F.2d 670, 671 (6th Cir.1987) (statement is material if it has "the capacity

to influence a reasonable lender"); *Ryan*, 828 F.2d at 1018 ("it is enough that the statement is of a type that could disturb the balance of facts that would otherwise be available to the bank").

A loan in the amount of $10,000 is significant information that a bank normally would expect to evaluate with other financial information provided by a loan applicant. In addition, we note that we do not evaluate the materiality of the $10,000 loan from First Finance to Haddock in a vacuum; instead, we look at the materiality of the loan in the context of other relevant evidence. The government presented evidence, and the jury could have found, that Haddock also failed to list a $350,000 line of credit extended by First Finance to Haddock. Because the loan was made to First Finance and because the bank relied on the strength of Haddock's personal financial position, the frequent transfer of funds from First Finance to Haddock certainly was relevant to a complete evaluation of First Finance's creditworthiness by the bank. Under these circumstances, existence of the $10,000 loan from First Finance to Haddock had the capacity to influence the bank by "disturb[ing] the balance of facts that would otherwise be available to the bank." *Ryan*, 828 F.2d at 1018.[14] We conclude that the $10,000 loan is legally material under § 1014.

Haddock also argues that the evidence related to omission of the $10,000 loan was insufficient to support the guilty verdict on Count 2. Failure to list outstanding loans on a form financial statement or loan application constitutes a false statement under § 1014. *Robinson v. United States*, 345 F.2d 1007, 1009-10 (10th Cir.), *cert. denied*, 382 U.S. 839, 86 S.Ct. 87, 15 L.Ed.2d 81 (1965);

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[14] Haddock's contention that the $10,000 loan is a wash because he, the borrower, owns 100% of First Finance, the lender, does not affect our determination of materiality. We will not disregard the separateness between Haddock, an individual, and First Finance, a corporate entity, that Haddock has gone to great lengths to create.

see also Theron, 832 F.2d at 497; *United States v. Stephens*, 779 F.2d 232, 237 (5th Cir.1985). Having reviewed the record thoroughly and viewing the evidence in the light most favorable to the government, we conclude that a reasonable jury could have found beyond a reasonable doubt that Haddock knowingly omitted the $10,000 loan from his financial statement with the purpose of influencing the bank's actions.

Count 3

Count 3 charges Haddock with executing a scheme to defraud the Bank of White City in violation of 18 U.S.C. § 1344. The count alleges that the Bank of White City gave Haddock (on behalf of First Finance) a $250,000 cashier's check in relation to the purchase of the Easton loan package. Undisputed evidence shows that a notation on the cashier's check stated that the money was a "down-payment on exclusive purchase rights." The count further alleges that instead of applying the funds to the purchase of the Easton loans, Haddock put $200,848.81 into the Herington Bancshares checking account on April 15, 1987 to cover a portion of the overdraft that is the basis of the charges in Count 1 and that Haddock used the remaining approximately $50,000 to fund the purchase of a personal residence. The parties do not dispute that Haddock eventually repaid $250,000 to the Bank of White City.

To prove a violation of § 1344, the government must prove that the defendant knowingly executed, or attempted to execute, a scheme or artifice either to defraud a financial institution or to obtain moneys or other property owned by a financial institution by means of false or fraudulent pretenses, representations, or promises. 18 U.S.C. § 1344. On appeal, Haddock argues that the evidence is conflicting as to whether he agreed to apply the $250,000 toward the purchase of the Easton loan package. Haddock also contends that the Bank of White City put no stipulation on the use of that $250,000 payment and

that he was entitled to assume that he could use the money in any way he pleased.

At trial, the government introduced evidence that the $250,000 cashier's check contained the notation, "for the down payment on exclusive purchase rights." In addition, the government introduced a commitment letter that reads in part as follows:

> The Bank of White City agrees to make a *downpayment of $250,000* to First Finance, Inc. this April 3, 1987 *for the exclusive rights to purchase* all or any part of a group of loans being purchased from FDIC from the failed Easton State Bank. Any loans purchased by The Bank of White City will first be offset against these downpayment dollars. Any remaining downpayment dollars after 90 days will be totally refunded.

(Emphasis added.) Patricia Fells, an officer at the Bank of White City, testified that she understood from the notation on the check and the language in the commitment letter that Haddock was to use the $250,000 to purchase loans from the failed Easton State Bank. The government then introduced evidence, based on the investigations of FDIC examiner Byron Lange and his assistants, that Haddock used the $250,000 to fund a capital injection into the Bank of Herington and to partially fund the purchase of a personal residence. Despite Haddock's contentions that there was evidence to the contrary, we conclude that the proof introduced by the government was sufficient such that a reasonable jury could have found that Haddock defrauded the bank by applying the $250,000 in a way that was contrary to an agreement between the bank and First Finance, thereby violating 18 U.S.C. § 1344.

Count 5

Count 5 charges Haddock with executing a scheme or artifice to obtain the moneys or funds of the Bank of White City by means of false or fraudulent pretenses,

representations or promises in violation of 18 U.S.C. § 1344. The count alleges that Haddock executed this scheme by representing that the Bank of White City would have exclusive rights to purchase loans from the failed Easton State Bank. Undisputed evidence at trial shows that the Bank of White City gave Haddock (representing First Finance) $350,000 as another downpayment for exclusive rights to purchase the Easton loans.

With regard to Count 5, Haddock likewise argues that the arrangement with the Bank of White City did not prohibit First Finance from using the $350,000 in any way it chose. The government introduced evidence that a commitment letter accompanied the $350,000 cashier's check and that the letter contained language identical to language quoted above in relation to the letter accompanying the $250,000 downpayment. The government also introduced evidence that, prior to advancement of the $350,000 Haddock (and First Finance) had already pledged all of the Easton loans as collateral for a $711,000 loan from Kaw Valley State Bank. Moreover, Patricia Fells testified that she and others from the Bank of White City understood that the Bank of White City would have exclusive rights to the Easton loans. She also testified that the Bank of White City would not have given the $350,000 to First Finance had she and others at the bank been informed that the loans were already pledged as collateral elsewhere. Based on this evidence, we conclude that a reasonable jury could have concluded that, in order to receive the $350,000, Haddock defrauded the Bank of White City by representing that the bank would have exclusive rights to the Easton loans.

Count 9

Count 9 likewise charges Haddock with executing a scheme or artifice to obtain the moneys or funds of the Bank of White City by means of false or fraudulent pretenses, representations or promises in violation of 18

U.S.C. § 1344. The count alleges that although the actual purchase price for the Galena loan package was $70,766.45, Haddock represented to the Bank of White City that the purchase price was $95,766.45.

At trial, Dave Farres, president of the Bank of White City, testified that he understood that the purchase price of the Galena loan package was $95,766.45. The government introduced into evidence an asset agreement between the Bank of White City and First Finance that reflected the $95,766.45 purchase price. The government also introduced into evidence an asset agreement from the FDIC files that shows the actual purchase price to be $70,766.45; testimony of FDIC examiner Byron Lange corrorborated this purchase price.

Farres also testified that the Bank of White City issued both a $50,000 check and a $70,766.45 check (a total of $120,766.45) to First Finance so that First Finance could purchase the Galena loans. Farres testified that the bank agreed that the $25,000 difference between the $120,766.45 advanced by the bank and the $95,766.45 purchase price—as represented by Haddock—was to be a servicing fee to First Finance. Based on this evidence, we conclude that a reasonable jury could have concluded beyond a reasonable doubt that Haddock defrauded the Bank of White City by representing the purchase price to be $25,000 more than First Finance actually paid for the Galena loans.

VII. Challenges to Sentencing

Haddock was sentenced to forty-two months' imprisonment on each of Counts 1-9 and to twenty-four months imprisonment on Count 10, all to be served concurrently. The conduct related to Counts 1-7 occurred prior to November 1, 1987, the effective date of the United States Sentencing Commission Guidelines (the "Guidelines"). The conduct related to Counts 8-10 occurred after that effective date. Therefore, the district court correctly sep-

arated sentencing for Guidelines offenses from sentencing for pre-Guideline offenses. On appeal, Haddock challenges the district court's calculation of total loss, which in turn determined the enhancement of his sentence under Counts 8-10.

The district court adopted the probation officer's offense level computation based on Guideline § 2B1.1 (larceny, embezzlement, and other forms of theft) for Count 8, Guideline § 2F1.1 (fraud and deceit) for Counts 9 and 10, and on Guideline § 3D1.2 (grouping of offenses involving substantially the same harm). In its application of Guideline § 2B1.1, the district court determined that the appropriate "loss" was $1,730,266, which resulted in an eleven level enhancement of the sentence for Count 8. In its application of Guideline § 2F1.1, the district court used the same loss amount, which resulted in a nine level enhancement of the sentence for Counts 9 and 10.

In arriving at the loss amount of $1,730,-266, the probation officer—and by adoption the district court—calculated the total amount of loans involved in each of the ten counts.[15] The presentence report relied on Guideline §§ 1B1.3(a)(2) & 3D1.2 to group the losses from all ten counts. Section 1B1.3(a)(2) provides that a specific offense characteristic—in this case the amount of loss—is determined "solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." Section 3D1.2(d) provides that "[a]ll counts involving substantially the same harm shall be grouped together"; counts involve substantially the same

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[15] Paragraph 52 of the presentence report states,

> The loans advanced to First Finance, Inc., or FDIC, used to calculate the amount of loss in the counts of conviction include $250,000 (FFI) received on April 3, 1987; $711,000 (FFI) received on May 5, 1987; $350,000 (FFI) received on January 24, 1987); $273,500 (FDIC) received on October 29, 1987; $50,000 (FFI) received on December 9, 1987; and $95,766 (FDIC) received on December 11, 1990. The total amount utilized to determine loss was $1,730,266.

harm "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss."

Haddock contends that by grouping the losses from Counts 1-7 (pre-Guideline offenses) with the losses from Counts 8-10 (post-Guideline offenses), the sentence enhancement arrived at by the district court for Counts 8-10 violates the Ex Post Facto Clause. We note that Haddock does not challenge that all counts involve substantially the same harm, nor does he dispute that the pre-Guideline offenses were part of the same course of conduct or common scheme as the post-Guideline offenses.

Haddock's ex post facto argument is without merit. The Ex Post Facto Clause prohibits " 'any statute which punishes as a crime, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission. . . .' " *Collins v. Youngblood*, —— U.S. ——, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925)). The district court's consideration of losses associated with pre-Guideline crimes in arriving at the Guideline offense level for Counts 8, 9, and 10 does not violate any of these ex post facto prohibitions. Grouping the losses from pre-Guideline crimes with losses from post-Guideline crimes arguably makes more burdensome Haddock's punishment for his post-Guideline crimes. This punishment for post-Guideline offenses, however, is not being imposed retroactively. Counts 8, 9, and 10 relate to crimes that were committed after the effective date of the Guidelines. We conclude that the enhancement of a sentence for a later offense based on losses associated with crimes that were committed prior to the effective date of the Guidelines does not violate the Ex Post Facto Clause. *United States v. Ykema*, 887 F.2d 697, 700 (6th Cir.1989) (augmenting punishment for later offense based on criminal acts committed prior to the passage of the enhancement law does not violate Ex Post Facto Clause), *cert. denied*, 493 U.S. 1062, 110 S.Ct. 878, 107 L.Ed.2d 961 (1990).

Haddock also contends that the district court erred in calculating the amount of the "loss" caused by Haddock for purposes of enhancing his sentence level. In particular, he argues that the court should not have assumed that the loans involved in each count were "losses" regardless of whether Haddock actually caused or intended to cause a loss. Because we reverse Haddock's conviction on Count 8, we need not address the calculation of "loss" under Guideline § 2B1.1, but only whether the district court appropriately calculated the "loss" under Guideline § 2F1.1, the Guideline related to fraud and deceit. The probation officer who prepared Haddock's presentence report relied on *United States v. Johnson*, 908 F.2d 396 (8th Cir.1990) for the proposition that the amount of loans, rather than actual loss to the lender, should be used to determine offense levels for bank fraud.

After the district court sentenced Haddock, this court decided *United States v. Smith*, 951 F.2d 1164 (10th Cir.1991), in which the defendant was convicted for acquiring loans from a federally insured institution by making fraudulent misrepresentations. In *Smith*, we relied on the commentaries to Guidelines §§ 2B1.1 and 2F1.1 and held that

> [t]he Guidelines increase a defendant's base offense level sentence for either actual or intended loss, whichever is greater. Where the fraud results in actual loss within the definition provided by the commentary to Guidelines § 2B1.1, that value will be considered for purposes of enhancement under section 2F1.1. Where there is no such loss, or where actual loss is less than the loss the defendant intended to inflict, intended or probable loss may be considered.

Id. at 1166 (footnotes and citations omitted).

In this case, the district court apparently did not attempt to determine whether any actual, intended or probable loss was caused by the defendant's conduct. Instead,

loss was assumed to be the amount of the loans Haddock obtained because of his fraudulent conduct. After *Smith*, we must conclude that this assumption is not always correct. In summary, in light of our recent decision in *Smith*, we reverse the sentence and remand for resentencing consistent with this opinion.[16]

CONCLUSION

Based on the foregoing, we AFFIRM Haddock's convictions on Counts 2-7, 9 and 10. Haddock's convictions on Counts 1 and 8 are REVERSED, and we REMAND for new trial on those two counts of misapplication of bank funds. Finally, we REVERSE Haddock's sentence, and we REMAND for resentencing on Counts 2-7, 9 and 10.

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[16] It appears that the Guidelines may have guided the district court's discretion in sentencing the defendant for pre-Guideline offenses. The court clearly recognized that the Guidelines do not govern sentencing for the defendant's pre-Guideline offenses, and we find no error in the court's looking to the Guidelines for guidance. *See United States v. Stumpf*, 938 F.2d 172, 175 (10th Cir. 1991). We reverse the sentence for Counts 2-7 and remand for sentencing as to those counts, however, because the court's improper calculation of loss under Guideline § 2F1.1 may have guided the court's discretion in sentencing the defendant for Counts 2-7.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 90-20075-01

UNITED STATES OF AMERICA,
Plaintiff,

vs.

KENNETH E. HADDOCK,
Defendant.

MEMORANDUM AND ORDER

On December 10, 1990, the defendant was convicted by a jury of two counts of willful misapplication of funds by an agent of a bank insured by the Federal Deposit Insurance Corporation (FDIC) in violation of 18 U.S.C. § 656; one count of making a false statement to a bank insured by the FDIC for the purpose of influencing action taken on an application for a loan in violation of 18 U.S.C. § 1014; six counts of executing a scheme to defraud or obtain monies by false representations from an insured bank in violation of 18 U.S.C. § 1344; and one count of inviting reliance on a false document for the purpose of influencing the action of the FDIC in violation of 18 U.S.C. § 1007. This matter is presently before the court upon defendant's motion for new trial. Having carefully reviewed the arguments of the parties, the court is now prepared to rule.

In the instant motion, the defendant raises three arguments. First, the defendant contends that the court erred in refusing to admit certain documents he offered. Sec-

ond, he asserts that the court erred in refusing to allow a "good faith defense" instruction with respect to counts I, II and VIII. Third, he argues that the weight of the evidence was insufficient to convict him on any of the charges.

Prior to addressing the specific arguments made by the defendant, we find it necessary to make these initial general observations. Motions for new trial are not favored, and new trials are to be granted with caution. *United States v. Troutman*, 814 F.2d 1428, 1455 (10th Cir. 1987). A motion for new trial is directed to the sound discretion of the trial court. *Id.*

I.

At trial, the defendant sought to introduce several photocopies of letters and other documents. The government objected to the introduction of these exhibits based on the contention that there was a genuine issue as to the authenticity of these documents. The court conducted a hearing and subsequently agreed with the government. The court determined that the documents were inadmissible pursuant to F.R.E. 1003. The court shall reexamine that ruling.

In general, duplicates are admissible to the same extent as originals. F.R.E. 1003. However, a duplicate is inadmissible when a question is raised as to the authenticity of either the original or the duplicate or in other circumstances when it would be unfair to admit the duplicate in place of the original. *Id.*; Annot., "Admissibility of Duplicates Under Rules 1001(4) and 1003 of Federal Rules of Evidence," 72 A.L.R.Fed. 732 (1985). Photocopies or xerox copies are considered "duplicates" under the Federal Rules of Evidence. F.R.E. 1001(4).

The court refused to admit five documents offered by the defendant. The court shall consider each document and the evidence offered concerning that document.

Exhibit 405—This document is a photocopy of a commitment to purchase issued by the board of directors of The Bank of Herington and/or The Bank of White City to First Finance, Inc. for the purchase of loans from FDIC from the failed Bank of Nortonville. The document is typed on The Bank of Herington stationery, is dated October 20, 1987, and is signed by the board of directors. The defendant testified that he caused the document to be typed in October, 1987, and he kept a copy after it was signed. The government offered the testimony of Dave Farres, President of The Bank of White City and a member of the board of directors. He testified that, although his signature is on the document, he had never seen it prior to trial. He further indicated that he had searched the bank's records and had not discovered a copy of the document. Finally, he stated that the board of directors had never been advised concerning the purchase of the Nortonville package of loans.

Exhibit 411—This is a photocopy of a letter from the deefndant to Robert Maxwell, senior vice-president of The Kaw Valley Bank and Trust Company. The letter is typed on First Finance, Inc. stationery and is dated May 4, 1987. The letter contains what appears to be Robert Maxwell's signature at the bottom of the second page below the following statement: "We mutually agree to the stated changes in this letter as an addendum to the loan commitment and loan agreement." Finally, the letter contains the following notation below the defendant's signature line: "KEH/je". The defendant testified that he mailed this letter to Maxwell and received a copy of the letter in return from Maxwell. The defendant also produced the envelope that the copy was allegedly returned in. Maxwell testified that he had no recollection of ever receiving the letter. He further testified that he had reviewed his bank's files and could not find the original or a copy of the letter. He further stated that the contents of the letter were significant and that he had no recollec-

tion of the particulars contained in the letter. He was unable to identify his signature because the detail was too sketchy. Maxwell also testified that the envelope produced by the defendant was unusual because it had a stamp attached to it. He indicated that most of the bank's business mail was metered, not stamped. Jane Engle, a secretary at The Bank of Herington, also testified concerning this document. She indicated that the initials at the conclusion of the letter would suggest that she typed the letter. She testified, however, that she did not remember typing this letter. She further testified that she had reviewed her files and her computer disks and that she had not found a record of the letter. Finally, she stated that she did not recall typing anything for the defendant on May 4, 1987 because she was working for the FDIC at that time.

Exhibit 412—This is a photocopy of another letter from the defendant to Robert Maxwell. The letter is typed on The Bank of Herington stationery and is dated October 30, 1987. The letter indicates that a copy of the letter was sent to Dave Farres at the Bank of White City. The defendant again testified that he caused this letter to be produced and it was mailed to Maxwell. Maxwell testified that he had never seen the letter prior to trial and that he did not recall the majority of the information contained in the letter. He further stated that he conducted a search of his bank's files and he had not discovered the original or a copy of the letter. Farres, who was the President of The Bank of White City during October 1987, testified that he had never seen the letter prior to trial. He indicated that he had searched the files of The Bank of White City and had not discovered the letter. He further indicated that the contents of the letter were contrary to his understanding of the facts at the time.

Exhibit 419—This is a photocopy of a letter from the defendant to Farres. The letter is dated October 30, 1987

and is typed on The Bank of Herington stationery. The defendant once again testified that he caused this letter to be produced and mailed to Farres. Farres testified that he did not remember receiving this letter. He further stated that he had reviewed The Bank of White City's files and he had not discovered the original or a copy of the letter.

Exhibit 421—This document is a photocopy of the minutes of a special meeting of The Bank of White City board of directors that occurred on December 4, 1987. The document appears to contain the signatures of the defendant, Farres, and Patty Fells, secretary of the board. The defendant testified that a special meeting of the board of directors did occur on December 4, 1987, and this document reflected the substance of that meeting. Farres testified that he did not recall any such meeting. He further testified that this document was not contained with the other copies of the minutes from other board meetings kept by the bank. Finally, he indicated that this document was unusual in two respects. First, he noted that the minutes did not reflect ratification of the previous meeting's minutes as was the usual practice. Second, he stated that it was unusual for a copy of the minutes to have his signature on it because he did not usually sign the minutes.

Based upon the aforementioned testimony, the court concluded that the government had raised a genuine question as to the authenticity of the originals. The evidence as to each document raised substantial questions about the genuineness of the originals. Accordingly, we refused to admit the documents. The court finds no error in reaching this conclusion.

II.

The defendant next contends that the court erred in failing to instruct the jury concerning "good faith" with regard to Counts I, II and VII. In Counts I and VII, the defendant was charged with misapplication of bank

funds by an agent of a bank insured by the FDC in violation of 18 U.S.C. § 656. In Count II, the defendant was charged with making a false statement to a bank insured by the FDIC in an application for a loan in violation of 18 U.S.C. § 1014. During the discussion of the instructions at trial, defendant's counsel argued that a good faith instruction should be given concerning Counts I and VII. He did not, however, argue for such an instruction for Count II.

The court finds no error in refusing to include a good faith instruction concerning Counts I and VII. With respect to these charges alleging violations of 18 U.S.C. § 656, the court instructed the jury that the government was required to prove that the defendant had acted "with intent to injure or defraud the bank." The court further explained that this phrase meant "to act knowingly and with the intent to deceive or to cheat the bank—ordinarily for the purpose of either causing a financial gain or a financial loss to someone or something." These instructions adequately conveyed the essence of a "good faith defense" instruction, and the court's refusal to give an additional instruction on good faith was not error. *See United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States v. Alcantar*, 832 F.2d 1175, 1179 (9th Cir. 1987).

The defendant did not request a good faith defense instruction concerning Count II. The failure to request a specific instruction constitutes waiver. *United States v. Wilkinson*, 754 F.2d 1427, 1432 (2d Cir. 1985), *cert. denied*, 472 U.S. 1019 (1985). In any event, the court's failure to instruct on good faith with respect to an alleged violation of 18 U.S.C. § 1014 was not error. *United States v. Wilcox*, 919 F.2d 109, 112 (9th Cir. 1990).

III.

The defendant next contends that the evidence at trial was insufficient to support the findings of the jury. On a motion for new trial based on the weight of the evidence,

the court need not view the evidence in the light most favorable to the vrdict. The court may evaluate the evidence and consider the credibility of the witnesses in determining whether the verdict is co' 'ary to the weight of the evidence such that a miscarriage of justice has resulted. *United States v. Suntar Roofing, Inc.*, 709 F.Supp. 1526, 1529 (D.Kan. 1989).

The court has carefully reviewed the evidence presented at trial, and we find that it was sufficient to support the defendant's convictions. Accordingly, we also find no merit to this argument.

In sum, the defendant's motion for new trial shall be denied. The allegations of error made by the defendant are without merit. The defendant was fairly tried and convicted.

IT IS THEREFORE ORDERED that defendant's motion for new trial (Doc. # 26) be hereby denied.

IT IS SO ORDERED.

Dated this 7th day of February, 1991 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 91-3075

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH E. HADDOCK,
Defendant-Appellant.

ORDER ON REHEARING

[Filed May 15, 1992]

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY EBEL, and KELLY, Circuit Judges, and CHRISTENSEN, District Judge.*

TACHA, Circuit Judge.

In his petition for rehearing, appellant Kenneth E. Haddock points out that our decision not to address his insufficiency of the evidence claim on Count 1 is inconsistent with cases in our circuit. The panel grants rehearing limited to this issue.

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* The Honorable A. Sherman Christensen, Senior District Judge for the United States District Court for the District of Utah, sitting by designation.

In this circuit, we have consistently held that when we reverse on appeal because of a procedural error at trial and remand for a new trial, we nevertheless must address the defendant's claim that evidence presented at trial on the reversed count was insufficient. We have reasoned that if evidence indeed was insufficient, retrial is barred by double jeopardy principles. *United States v. Perez*, 1992 WL 47664, at *4 (10th Cir. Mar. 17, 1992); *United States v. Daily*, 921 F.2d 994, 1011 (10th Cir. 1990); *cert. denied*, 112 S. Ct. 405 (1991); *United States v. Sullivan*, 919 F.2d 1403, 1428 (10th Cir. 1990); *United States v. Doran*, 882 F.2d 1511, 1526 (10th Cir. 1989); *United States v. Massey*, 687 F.2d 1348, 1354 (10th Cir. 1982); *United States v. Morris*, 612 F.2d 483, 491-92 (10th Cir. 1979). Constrained by precedent on this matter, we grant appellant's motion for rehearing and address the sufficiency of the evidence on Count 1.[1] Accordingly, we now vacate the following sentence of our earlier opinion: "Because we reverse Haddock's conviction on Count 1 and remand for new trial on that count, we do not consider whether evidence was sufficient to convict on that count." *United States v. Haddock*, 1992 WL 26040, at *12 (10th Cir. Feb. 14, 1992).

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[1] We note that several of our sister circuits recently have arrived at an opposite conclusion based on *Richardson v. United States*, 468 U.S. 317 (1984). *United States v. Miller*, 952 F.2d 866, 870-74 (5th Cir. 1992) (reversing *United States v. Sneed*, 705 F.2d 866 (5th Cir. 1983) and holding that "under *Richardson* jeopardy has not terminated"; Double Jeopardy Clause does not bar retrial), *petition for cert. filed*, (U.S. Apr. 10, 1992) (No. 91-1617); *United States v. Douglas*, 874 F.2d 1145, 1149-51 (7th Cir.) (in light of *Richardson*, court was not convinced that Double Jeopardy Clause compels appellate court to review sufficiency of evidence), *cert. denied*, 493 U.S. 841 (1989); *United States v. Porter*, 807 F.2d 21, 22-24 (1st Cir. 1986) (reasoning of *Richardson* controls; Jeopardy of first trial never terminated), *cert. denied*, 481 U.S. 1048 (1987); *see also Evans v. Court of Common Pleas*, 1992 WL 48673, at *9 (3d Cir. Mar. 18, 1992) ("reversal of [a defendant's] conviction for trial error simply continues the jeopardy that was begun in her first trial," and "double jeopardy is not implicated, '[r]egardless of the sufficiency of the evidence at [her] first trial'").

Count 1 charged Haddock with violating 18 U.S.C. § 656 by presenting a $960,892 check to the Bank of Herington as part of an agreement with the FDIC to acquire control of another bank, the First National Bank of Herington. The check was written on a Herington Bancshares account held at the Bank of Herington. The government presented evidence suggesting that Haddock knew that only $611,000 had been deposited in the account to cover payment of the check. The government contends that this allowed Herington Bancshares to have interest-free use of approximately $350,000 of the Bank of Herington's funds from April 3, 1987, when the check was written, until April 15, 1987, when Haddock deposited enough additional funds in the checking account to cover payment of the check. For reasons that were not made clear at trial, the check was not returned for insufficient funds during that twelve-day period.

To prove a violation of § 656, the government must show beyond a reasonable doubt that (1) the defendant was an executive officer of the bank, (2) the bank was connected in some way to the Federal Reserve System, (3) the defendant willfully misapplied the funds of the bank, and (4) the defendant acted with the intent to injure or defraud that bank. 18 U.S.C. § 656; *United States v. Unruh*, 855 F.2d 1363, 1367 (9th Cir. 1987), *cert. denied*, 488 U.S. 974 (1988).

Haddock cites several cases, including *Williams v. United States*, 458 U.S. 279 (1982), and *United States v. Cronic*, 900 F.2d 1511 (10th Cir. 1990), for the proposition that presentation of a single check written on an account with insufficient funds cannot sustain an allegation criminality. We disagree that *Williams* and *Cronic* support such a broad proposition. In *Williams*, the Supreme Court reversed the defendant's conviction under 18 U.S.C. § 1014 by holding that the writing of a check "did not involve the making of a 'false statement'" as required under § 1014. *Williams*, 458 U.S. at 284. Other cases have applied the reasoning of *Williams* to statutes

requiring a showing of a false representation or pretense. *See, e.g., United States v. Bonnett*, 877 F.2d 1450, 1456-57 (10th Cir. 1989) (applying *Williams* to 18 U.S.C. § 2113(b)). However, to be convicted under § 656, a defendant need not have made a false statement or representation. For this reason, *Williams* and other "false statement" cases cited by Haddock are not relevant to a conviction under § 656.[2]

Overdrafts alone are insufficient to establish a violation of § 656. *United States v. Hughes*, 891 F.2d 597, 599 (6th Cir. 1990). However, when there is evidence that a bank executive willfully misapplies funds by writing a check on an account lacking sufficient funds and does so with the intent to defraud or injure the bank, then an overdraft can become the basis for a § 656 violation. *See Hughes*, 891 F.2d at 600; *Unruh*, 855 F.2d at 1368-69; *Swingle v. United States*, 389 F.2d 220, 222 (10th Cir.), *cert. denied*, 392 U.S. 928 (1968).

At the time Hadock signed and presented the $960,892 check, he was chairman of the board, president, and chief executive officer of the Bank of Herington—the payee of the check. He clearly exercised substantial control over the bank's twelve or so employees and over much of what occured at the bank. He also was the primary shareholder of Herington Bancshares—the holding company on whose account the check was written. Because he negotiated

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[2] In *Cronic*, we reversed a defendant's conviction under 18 U.S.C. §§ 1341, 1343 & 1344 for overdrafting his checking account. However, we did not—as appellant implies—hold that a check written on an account with insufficient funds cannot violate these statutes. Instead, we held that the government, by allowing the jury to be instructed only according to the language of § 1341 and not according to §§ 1343 and 1344 (prohibiting a "scheme to defraud"), "saddled itself with the burden of establishing that money was obtained . . . *by means of* false and fraudulent *pretenses, representations, or promises.*" 900 F.2d at 1515. Accordingly, under the reasoning in *Williams*, we held that the jury could not have found the defendant guilty of these charges when the evidence only showed that he wrote checks on an overdrawn account.

with the FDIC to acquire control of the First National Bank of Herington, Haddock clearly was aware of the amount of money that was to be injected into the Bank of Herington on April 3, 1987. Although the amount of the check exceeded deposits in that account by almost $350,000, the check oddly was never returned.[3] Given the amount of control Haddock exercised over all aspects of this transaction and over the Bank of Herington, we conclude that evidence presented regarding Haddock's actions —viewed in the light most favorable to the prosecution— was sufficient to warrant a reasonable jury's finding that Haddock willfully misapplied bank funds with the intent to injure or defraud the bank. *See Unruh*, 855 F.2d at 1369 (question of whether checks written by insider causing negative average balance of $64,000 on thirty-nine of fifty-six days constituted willful misapplication with intent to injure or defraud bank was for the jury); *see also Hughes*, 891 F.2d at 600 (a bank customer's "fiscal laxity" in alowing checks to exceed deposits by more than $36,000 "can be construed as reckless disregard for the interests of the Bank which could warrant a jury finding of intent to injure or defraud the Bank"); *Swingle*, 389 F.2d at 222 ("evidence show[ed] there was more than the payment of overdrafts" where checks written by bank president were "held and presented each day without posting" and no deposits were required to cover them).

The remainder of Haddock's contentions raised in his petition for rehearing are without merit.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are

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[3] We also note that, according to evidence presented at trial, a significant portion of the approximately $350,000 that Haddock finally deposited into the Herington Bancshares account to cover the check written on April 3 came from the $250,000 that Haddock received from the Bank of White City as a downpayment for the purchase of the Easton loan package. The receipt and use of this $250,000 is the subject of Haddock's conviction on Count 3.

in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied.

APPENDIX D

* * * *

[362] Q. Thank you, ma'am. This reconciliation of April the 15th when you found out the problem. This other young lady brought it to your attention.

A. Yes.

Q. That would have been the very first day that the problem was found out?

A. Yes.

Q. But you just told the Court and this jury that the bank's books are reconciled on a daily basis?

A. They are to be reconciled, and they have been since then on a daily basis. After we purchased the First National Bank, she just didn't have time and nobody realized she was not balancing those books.

[363] Q. And this was a period of time when, I guess, Ken Haddock or you as President were not trooping the line to make sure.

A. I wasn't President at that time, but, no, we just didn't have time, either.

Q. It was just so busy, wasn't it?

A. That's correct.

Q. So actually then, I guess, on the 6th or 7th of April the books didn't reconcile.

A. That's right, they didn't.

Q. And if somebody would have had the time, they would have determined on the 5th or the 6th that the books didn't reconcile.

A. Yes.

Q. So then the Board of Directors would not have gotten this interest-free loan for maybe just one day.

A. That's right.

Q. But somebody would have been—

A. Would have balanced, yes.

Q. Now, just because we were so busy, that's why it took so long.

A. That is correct.

* * * *